Internal Revenue Service

memorandum

TL-N-3310-91
ORPirfo

date: MAR 13 1991

to: District Counsel, Chicago MW:CHI
Attention: Teri A. Frank

from: Chief, Branch No. 2, Tax Litigation Division CC:TL:Br2

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subject: [redacted] Statute Extensions

This responds to your request for advice, dated January 28, 1991, on how to protect the statute of limitations on assessment for the aforementioned taxpayer and for any of its relevant transferees or successors.

While your request was directed to all the taxable years [redacted] through [redacted], because of the differing time constraints cited in your memorandum, and since the various years at issue are more conveniently discussed in separate groupings, this memorandum will only address the [redacted], [redacted] and [redacted] taxable years. These are the years for which you apparently require the most immediate assistance since the statute extension consents you have for these years purportedly "expire" on [redacted].

The other years referred to in your request will be addressed by us in future memoranda, as appropriate.

ISSUE

In order to protect the Government's interest, which is the proper corporation to execute any Forms 872 and/or Forms 977 consenting to the extension of the statute of limitations on assessment in the case of the income tax liability of a consolidated group that has been restructured, as described below.

FACTS

The material facts are set forth in your aforementioned request of January 28, 1991, the attachments thereto, and as supplemented in subsequent telephone conversations and meetings between Teri A. Frank of your office and Russ Pirfo of this office. These facts may be summarized with regard to the relevant taxable years addressed herein as follows:

[redacted] (EIN [redacted])[1] [redacted] filed consolidated returns for the taxable years [redacted], [redacted], and [redacted]. [redacted], the common parent of the group, was incorporated under the laws of Delaware.

[redacted] (EIN [redacted]), also a Delaware corporation, was formed on [redacted]. [redacted], another Delaware corporation, was organized as a wholly-owned subsidiary of [redacted].

On [redacted], pursuant to Delaware law, [redacted] merged with and into [redacted] (formerly [redacted]), with [redacted] terminating and [redacted] surviving the merger. As a result of this, [redacted] became a wholly-owned (direct or indirect) subsidiary of [redacted]. This acquisition of [redacted] by [redacted] was a "reverse acquisition" under Treas. Reg. § 1.1502-75(d)(3).[2]

Following the merger, [redacted]% of the common stock of [redacted] was held directly by [redacted] and the remaining [redacted]% was held by [redacted] first and second tier subsidiaries of [redacted].

On [redacted], [redacted] adopted a plan of complete liquidation pursuant to section 332. Between that time and [redacted], [redacted] distributed assets consisting of the common stock in its various operating subsidiaries to those [redacted] subsidiaries in redemption of their stock in [redacted]. Each of these corporate [redacted] shareholders executed an agreement whereby each corporate shareholder assumed certain liabilities and obligations of the [redacted] operating subsidiaries. The liabilities and obligations assumed by these shareholder corporations were limited to those arising from the operations of the respective operating subsidiaries whose stock each had received in the liquidation.

On [redacted], [redacted] (EIN [redacted]) made a final distribution of assets to [redacted] (EIN [redacted]),

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[1] This corporation changed its name to [redacted] in [redacted].

[2] This factual conclusion is based upon the statements of the taxpayer contained in the attachments to your request and the information you submitted to us regarding fair market values for the outstanding stock of [redacted], common and preferred, that were involved in the transaction. On the basis of your figures, the former [redacted] shareholders would have received well over fifty percent of the fair market value of the outstanding stock of [redacted]. Hence, a reverse acquisition under the regulations had occurred.

which by that time was now [redacted]'s sole shareholder. [redacted] made a general assumption of all the liabilities and obligations of [redacted], including a specific assumption of federal income tax liability. In addition, [redacted] also changed its name to [redacted] at that time.

On [redacted], "old" [redacted] (EIN [redacted]) (the former [redacted] and the common parent of the consolidated group for the taxable years in issue here) filed a certificate of dissolution with the Delaware Secretary of State.

[redacted] (formerly [redacted]) was subsequently acquired by [redacted], on [redacted]. At that time, [redacted] (formerly [redacted]) was merged with and into [redacted] (a wholly-owned subsidiary of [redacted]) with [redacted] going out of existence and [redacted] left as the surviving corporation of that merger. [redacted] then adopted the name of [redacted] as well.

A number of transferee agreements as well as certain consent forms purporting to extend the statute of limitation on assessment (including that for transferee liability) have been executed. These consents are recounted in your memorandum and we will discuss each, and its effect, as appropriate below.

DISCUSSION

Primary Liability (Forms 872)

Since the [redacted], acquisition of the [redacted] (EIN [redacted]) group by [redacted] (EIN [redacted]) was a "reverse acquisition" under Treas. Reg. § 1.1502-75(d)(3), there is some question as to whether [redacted] (EIN [redacted]) continued to be the common parent for the acquired group for the preacquisition years.[3] When the old common parent (i.e., the "second corporation" under Treas. Reg. § 1.1502-75(d)(3)) does not go out of existence in a reverse acquisition, despite its deemed replacement as common parent by the acquiring corporation (the "first corporation" under Treas. Reg.§ 1.1502-75(d)(3)), it is Service position that the change in common

[3] The leading case of Southern Pacific Co. v. Commissioner, 84 T.C. 375 (1985), involved a reverse acquisition under Treas. Reg. § 1.1502-75(d) wherein the old common parent's corporate existence terminated. The court held that under those circumstances the new common parent automatically became the common parent for preacquisition consolidated years as well as for future postacquisition years.

parent is only applicable to postacquisition years.[4] If it still exists, we view the former "old" common parent as continuing as the agent for the group for the preacquisition years and as the proper party to execute statute extension consents for those years. Consequently, on the facts here, the Service position is that [redacted] (EIN [redacted]) was the proper agent to execute Forms 872 for the consolidated group for taxable years [redacted] through [redacted].

[redacted] (EIN [redacted]) did execute a series of Form 872 consents to extension of the statute. This unbroken chain of consents extended the original period for assessment until [redacted].[5] See section 6501(c)(4). Your memorandum notes, however, that [redacted] (EIN [redacted]) in fact had been formally dissolved (on [redacted]), which was prior to its execution of the last [redacted] of these consents (i.e., those Forms 872 executed in [redacted], [redacted], and [redacted]). Despite its formal dissolution, [redacted] still had authority thereafter to act as the common parent agent for the group. Its existence continued after its dissolution for a three year period, as discussed below. Thus, it could still extend the statute of limitations on assessment.

A corporation is a creation of state law. All relevant corporations here were Delaware corporations, including [redacted] (EIN [redacted]). Under Delaware General Corporation Law § 278, any dissolved corporation[6] is nevertheless continued in existence for the term of three years for purposes of "winding up" its affairs. Hence, since [redacted] (EIN [redacted]) was dissolved on [redacted], its general "winding up" authority to act under § 278 still ran until [redacted]. The Forms 872 were executed by [redacted].

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[4] [redacted] (b)(7)e [redacted].

[5] It should always be kept in mind that a valid extension consent by the common parent agent automatically extends the period for assessment of liability as to each and every subsidiary that was a member of the group for that year. Treas. Reg. § 1.1502-77(a). That liability is for the entire tax of the consolidated group. Treas. Reg. § 1.1502-6(a).

[6] The case of a corporation that goes out of existence by way of dissolution must be distinguished from the one that ceases to exist as result of a merger. See Del. Gen. Corp. Law § 259.

within this winding up period and were therefore valid acts by the formally dissolved corporation. The consent of the dissolved [redacted] was effective in extending the statute of limitations as to each of the subsidiaries in the group until [redacted].[7]

Since this liability is the several liability of each of the members for the entire consolidated tax for the years in issue, the full assessment could be made as of now against any one of these group members still extant. The winding up period for the old common parent, however, has since expired. To extend again the period for assessment of this primary liability, it will be necessary to deal directly with the individual group members and secure consents to extension from each individual corporation sought to be bound. See the last sentence of Treas. Reg. § 1.1502-77(a). Any member which did not sign a consent in its own name, could no longer be assessed after [redacted].[8]

We would recommend that new statute consents be sought, if

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[7] While at first it may seem anomalous that the common parent can bind the subsidiaries beyond that time in which the parent's winding up authority expires (i.e., the corporation's winding up authority expires on [redacted] vs. the corporation's consent to assessment extension until [redacted]), this situation is analogous to the case of an agent who may bind his principal to future acts but subsequently loses his agency authority after making the commitment on behalf of his principal. In that case the principal is not relieved of his obligation simply because the agent no longer has authority; rather, whether the agent had authority at the time of the making of the commitment is the only relevant inquiry. In the case of the defunct common parent here, its agency authority for tax purposes did exist at the time it consented to the extensions. It was therefore able at the time of signing the consents to bind the group beyond the time limits of its own existence.

[8] It has been suggested by Appeals that perhaps these remaining corporations could designate "old" [redacted] (currently known as [redacted] as well) as their agent for purposes of executing a consent. Under Treas. Reg. § 1.1502-77(d) this is not possible. The regulation requires that the members "designate another member." Our view is that means a corporation which was a member of the group for the taxable year in issue. Here, [redacted] was not a member in the relevant years. It or a member corporation could later challenge the consent on that ground. In addition, we have taken the position that any such designation must be unanimous, though the regulation is silent as to this specific point. In this case unanimous approval is not possible, since some of the member corporations have gone out of existence.

not from all, at least from the largest (in terms of assets) subsidiary corporations of the old [redacted] group for each of the taxable years [redacted] through [redacted].[9] We understand from the facts in your memorandum and our telephone conversations with you and Appeals, however, that a majority of these subsidiaries have since gone out of existence as well. Nevertheless, to the extent that these members are still available, Forms 872 should be secured to preserve primary liability in addition to any of the separate efforts to preserve relevant transferee liability (discussed infra).[10] The aforementioned proposed actions to preserve the primary or direct liability of the subsidiaries or their successors would not prejudice any otherwise available transferee liability. In response to your specific question, note that we do not recommend pursuing these Forms 872 solely, to the exclusion of any transferee liability approach.

Transferee Liability (Forms 977)

After [redacted] (EIN [redacted]) was formally dissolved and had transferred its remaining assets to [redacted] (EIN [redacted]), [redacted] executed a Form 2045 in [redacted] acknowledging its transferee status.[11] At that time, [redacted] (which had since changed its name to [redacted])

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[9] If you get extension consents directly from the subsidiaries, we suggest that a notice stating that you are dealing directly with each of the subsidiaries individually be sent to [redacted] (now [redacted]) in its capacity as the corporate successor to [redacted] and to [redacted] as well, in its own name. See Treas. Reg. § 1.1502-77(a). We recommend this because of the earlier question surrounding which corporation would be the common parent. See fn. 3 and 4, supra, and accompanying text.

[10] The fact that most of these member corporations no longer exists presents more of a practical than legal problem, at least where that corporate existence was terminated by a merger. Note that a "successor" corporation by merger (a corporation into which the old group member may have merged) would be able to bind itself to a statute extension on assessment just as if the original group member had signed the consent. See Del. Gen. Corp. Law § 259(a). You may want to consider the possibility of taking this course of action as well, i.e., getting any available successor corporations to execute consents.

[11] [redacted] had also executed a Form 2045 earlier, in [redacted]; however, at that time, [redacted] had not as yet directly received assets or assumed the liabilities of [redacted]. In light of this fact, the later Form 2045 referred to in the text was executed after the actual transfers had occurred.

also executed a Form 977 purportedly extending the period for assessment against it as a transferee.

[redacted] (formerly [redacted]) subsequently executed additional Form 977 extensions, in [redacted] and [redacted]. The last Form 977 consent extended the period for assessment of transferee liability until [redacted]. Because the first extension was certainly executed within the original one-year transferee liability period, the series of Forms 977 from the former [redacted] have successfully extended the limitation statute on assessment as to its transferee liability. In addition, notwithstanding these putative extensions, note that the period for assessment against a transferee runs one year beyond the expiration of the assessment period against the original transferor without any need for an agreement on the part of the transferee. Section 6901(c)(1). Hence, in this case, [redacted] (formerly [redacted]) would have been liable as a transferee until at least [redacted], in any event (i.e., one year after the liability period of the original transferor expired) even without the execution of an extension consent.[12]

[redacted] (formerly [redacted]) has since gone out of existence by way of its merger into [redacted] on [redacted]. Nevertheless, as suggested in your memorandum, when [redacted] (now also named [redacted]) merged with the former [redacted], [redacted] succeeded to the obligations and liabilities of [redacted] (formerly [redacted]) as a successor corporation. Chief among these obligations was the transferee liability that the former [redacted] had as a transferee of the dissolved [redacted].[13] Since

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[12] See also subsection 6901(e) (providing that for purposes of transferee liability, if any person is a corporation which has terminated its existence, the period of limitation for assessment against such person shall be that period that would be in effect had termination of existence not occurred). Under this authority, it could be argued that [redacted]'s (formerly [redacted]) liability as an initial transferee would run until [redacted], since the dissolution of [redacted] would be ignored and its valid consent would have extended the period of its original transferor liability until [redacted].

[13] Because the concepts are often confused, note that [redacted] was a transferee of [redacted], it was not its successor under Delaware law. Transferee liability may arise "at law" or "in equity." This distinction is a function of whether the transferee specifically agreed to undertake the obligations of the transferor (law) or whether the transferee simply received the assets of the transferor as a distributee without agreeing to meet any obligations (equity). Transferee liability in equity is limited to the value of the assets

[redacted] was a successor to [redacted], it stepped into the position of [redacted] with regard to this transferee liability. Thus, as stated in your memorandum, we agree that [redacted] was "primarily liable" as an initial transferee just as [redacted] was so liable. This liability arose by operation of state law. See Del. Gen. Corp. Law § 259(a). The agreement of the parties (see Section 1.4, Attachment 8 to your request) simply spells out expressly the same legal consequences and serves to reinforce [redacted]'s "primary" obligation for the transferee liability of [redacted]. As a result, [redacted] (now named [redacted]) may itself execute Forms 977 extending the limitation period for assessment as an initial transferee of the dissolved [redacted] in the same way that [redacted] would have been able to do.[14]

We would recommend also that a Form 2045 transferee agreement be secured from [redacted] (now [redacted]) acknowledging its successor role to [redacted] but also reciting its initial transferee status in relation to [redacted] (EIN [redacted]) by virtue of that successorship.

There is also the transferee liability of the various [redacted] subsidiaries that received the stock in [redacted]'s operating subsidiaries to consider. Furthermore, there may have been a second transfer when the "old" operating subsidiaries transferred assets to the [redacted] subsidiaries, whether through dissolution or by merger. These [redacted] subsidiaries would also be transferees of the operating subsidiaries, or possibly even successors if these corporations were merged with those operating subsidiaries. Depending upon the various assumption agreements made, even if they are only transferees, these corporations -- despite being subsequently sold off by [redacted] -- may be liable for the entire tax of the old consolidated group. To the extent that an "old" operating subsidiary corporation merged into one of the [redacted] subsidiaries, with the "old" operating subsidiary going out of existence and the [redacted] subsidiary surviving, the liability of that surviving corporation as the successor to the "old" [redacted] operating subsidiary would be for the entire tax of the

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transferred; however, depending upon the agreement of the parties to the transaction, transferee liability at law may not be so limited. See Jahncke Service, Inc. v. Commissioner, 20 B.T.A. 837, 846 (1930). For our purposes, [redacted]'s liability was as a transferee at law since it specifically agreed to assume the federal income tax liability of [redacted].

[14] As explained previously, the liability as an initial transferee of [redacted] (now named [redacted]) would run until at least [redacted] and probably until [redacted] in any event without an extension. See fn. 13, supra, and accompanying text.

consolidated group under the principles explained in this memorandum. Since our office has little information with regard to the continued existence or agreements surrounding these operating subsidiaries and their respective transferees or successors, we cannot offer specific advice as to this avenue other than recommending that you consider its availability.

CONCLUSION AND RECOMMENDATION

For the reasons explained herein, we conclude that the Forms 872 executed by [redacted] (EIN [redacted]) were valid consents to the extension of the statute of limitations on assessment for the taxable years in issue. This extension applies to all subsidiaries that were members of the consolidated group for those taxable years. Note that the extension for the subsidiaries expires on [redacted], whereas the primary liability of the common parent, [redacted] already expired on [redacted], when its winding up authority ended. Thus, primary liability of the subsidiaries may still be extended but not that of the common parent. To extend any further the time for assessment against the subsidiaries, however, it will now be necessary to secure consents directly from each such subsidiary.

The transferee liability of [redacted] (now named [redacted]) is one of "primary liability" as an initial transferee by virtue of [redacted]'s status as a successor to [redacted]. It may validly consent to further extensions in the period of that initial transferee liability in the same manner as [redacted] would have been able to do. In our view, however, the original one-year period for liability of an initial transferee has not as yet even expired.

The liability of the [redacted] first and second tier [redacted] subsidiaries as transferees of [redacted] as well as their liability as transferees or successors of the various "old" operating subsidiary corporations should also be investigated. This liability, at least with respect to those surviving corporations that were successors to the operating subsidiaries, could be for the entire amount of the [redacted] consolidated group's income tax under the regulations.

We are available to discuss the specific wording of the forms and agreements suggested above. We have already done so to some extent with Appeals. Please contact Oreste Russ Pirfo at FTS 566-8665 should you have any questions or need further assistance.

Alfred C. Bishop, Jr. /CMH

ALFRED C. BISHOP, JR.